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IN THE

Supreme Court of the United States

OCTOBER 1971 TERM

No. 71-356

CITY TRADE & INDUSTRIES, LTD.,
Petitioner,

vs.

ALLAHABAD BANK, BANK OF BARODA
and BANK OF TOKYO, LTD.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Is the determination below one which requires or justifies the exercise by this Court of its discretionary review powers?

(2) Did the Court below properly apply the doctrine of collateral estoppel to the facts presented herein, to-wit, the attempted relitigation of issues once decided against Petitioner by a court of competent jurisdiction after a full and fair opportunity to litigate said issues?

RULES INVOLVED

(1) Rule 19. Rules of the Supreme Court of The United States:

> Rule 19. Considerations Governing Review on Certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.
>
> 2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

(2) Rule 56, Federal Rules of Civil Procedure:

See Petition for Certiorari, pp. 2-4.

STATEMENT OF THE CASE

Respondents, Allahabad Bank, Bank of Baroda and Bank of Tokyo, Ltd.[1] (hereinafter, the Indian Banks), do not object to so much of the Statement of Facts presented by Petitioner, City Trade & Industries, Ltd. (hereinafter, CTI) as consists of direct quotations from the opinion of the Fifth Circuit Court of Appeals (Petition for Certiorari, pp. 5-8). The Indian Banks do, however, submit the following additional facts in lieu of CTI's narrative beginning on page 8 of the Petition for Certiorari and ending on page 13 thereof:

CTI instigated the New York accounting proceedings against New Central Jute Mills Co., Ltd. (hereinafter, New Central) notwithstanding the provision of the contract between the parties requiring arbitration. CTI knew, or should have known, that in order to obtain judicial relief in New York, it would have to prove to the satisfaction of the New York courts that New Central was not entitled to arbitration. Nevertheless, CTI proceeded, and when faced with a demand for arbitration by New Central, relied on its "alter ego" theory involving the Indian Banks to attempt to show a waiver by New Central of the arbitration clause. The pleadings in the

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[1] Subsequent to the remand of this case by the Fifth Circuit, the Indian Banks, upon leave granted by the District Court, amended their pleadings to change their corporate names to those here set out. During the course of the proceedings below, the names of the Banks were changed according to the laws of their respective countries for reasons not pertaining to this litigation.

New York proceedings are replete with attempts by CTI to set up the Indian Banks as "alter egos" of New Central, CTI knowing that if this failed, arbitration would be forthcoming. The "alter ego" issue went to the very heart of CTI's New York action. CTI fought hard. It lost.

While the New York proceedings were under way, CTI was also in the United States District Court for the Southern District of Georgia (the instant action) litigating directly with the Indian Banks over the same negotiable instruments, the ownership and control of which CTI was attempting, in New York, to set up in New Central in order to defeat New Central's demand for arbitration. Upon review of the Record on Appeal in New York, it became apparent to counsel for the Indian Banks that not only was CTI duplicating its New York "alter ego" theory in the instant action, but that in effect, one set of pleadings was being used both in New York and in the District Court below. This duplication was obvious to the Fifth Circuit, and thus presented that Court, as it did the District Court, with a classic set of facts to which to apply the modern rule of collateral estoppel.

ARGUMENT

I. This Case Is Procedurally Inappropriate for Review on Writ of Certiorari.

CTI alleges three reasons for granting its petition for Writ of Certiorari: (1) the Fifth Circuit failed to apply the standards for collateral estoppel prescribed by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, ____ U. S. ____, 28 L.Ed.2d 788 (No. 338, May 3, 1971); (2) the decision of the Fifth Circuit is "at variance with the procedural rules" of the federal and New York courts; and (3) this case raises major issues of law not previously determined by this Court. (Petition for Writ of Certiorari, p. 13). None of

these reasons warrants the exercise by this Court of its discretionary review powers.

Rule 19, Rules of the Supreme Court of the United States, defines the character of reasons upon which a Writ of Certiorari may be granted—reasons which, in the express language of the rule, must be "special and important." Paragraph 1(b) of the rule describes situations where review of a decision of a Court of Appeals may be necessary:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. Sup. Ct. R. 19 (1) (b) (1970).

The allegation that the decision below is in conflict with the *Blonder-Tongue* case relies upon three sentences from that opinion which, reduced to their simplest form, impose upon a court an affirmative duty to insure that the doctrine of collateral estoppel is not applied so as to work unfairness. Even assuming *arguendo* that *Blonder-Tongue* is relevant to the case at bar, it is at once evident that the Fifth Circuit did not stray from the *Blonder-Tongue* guidelines. After a lengthy discussion, the court concluded that "application of the doctrine [of collateral

estoppel] in this case would occasion no unfairness."[2] *James Talcott, Inc. v. Allahabad Bank,* 444 F.2d 451, 463 (5th Cir., 1971); Petition for Certiorari, p. 24a. Thus, even under the most favorable analysis, petitioner's first "reason" is patently meritless.

The third allegation, that now is an opportunity for this Court to elaborate upon its opinion in *Blonder-Tongue,* is akin to CTI's first allegation. The reason for analogy is unclear; *Blonder-Tongue* was a patent case, decided on federal law and federal procedure, whereas in the instant action the District Court was obligated to apply the choice of law rules of the forum state. As the court below found, this resulted in application of the New York law on collateral estoppel, not federal law. 444 F.2d at 461, n.9. Although the *Blonder-Tongue* decision is not at variance with the New York collateral estoppel standards,[3] it is nonetheless true that there is no compelling reason for this Court to concern itself with a matter of state law which has no bearing upon the prior decisions of this Court. As this Court stated in *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U. S. 667, 674 (1950), "we do not re-examine the local law as applied by the lower courts."

CTI's second allegation, to-wit, that the granting of summary judgment was procedurally incorrect and therefore denied CTI due process of law, seems strange

[2] For a full description of the fairness aspect of the doctrine of collateral estoppel as applied to the facts of this case, see 444 F.2d 451, 461-463; Petition for Certiorari, pp. 21a-24a.

[3] Schwartz v. Bronx City Public Administrator, 24 N.Y.2d 65, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969); B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 278 N.Y.S.2d 596, 225 N.E.2d 195 (1967); Cummings v. Dresher, 18 N.Y.2d 105, 271 N.Y.S.2d 976, 218 N.E.2d 688 (1966); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 151 N.Y.S.2d 1, 134 N.E.2d 97 (1956); *See also,* Note, Collateral Estoppel: The Demise of Mutuality, 52 Cornell L.Q. 724 (1967).

indeed in light of the purpose of summary judgment—the prompt disposal of an action in which there is no genuine issue of material fact. Original Committee Note of 1937 to Rule 56, *quoted in 6 Moore's Federal Practice*, ¶56.01[2], p. 2014 (1966). If exhaustion of all procedural avenues, including trial, were required in all cases, Rule 56, F.R.C.P. (Petition for Certiorari, pp. 2-4) would be reduced to mere surplusage.

Summary judgment inherently requires familiarity with the facts. In *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L.Ed.2d 30, 32 (1959), Mr. Justice Brennan said:

> But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Court Judge in relation to a particular set of facts.

Accordingly, certiorari was denied. 361 U.S. 887 (1959). Just as clearly, the Writ should be denied in this case.

II. This Case Is Substantively Inappropriate for Review on Writ of Certiorari.

The gravamen of CTI's Petition for Certiorari is the contention that the Fifth Circuit erroneously applied the New York doctrine of collateral estoppel to the facts of the present litigation. This line of argument, in addition to failing to constitute sufficient reason to grant certiorari as before set out, is in substance without merit. CTI has obviously mistaken and misunderstood the holding of the Fifth Circuit. The Fifth Circuit did not hold, as CTI alleges, that the issue of holder-in-due-course status by the Indian Banks was adjudicated by the Courts of the

State of New York against CTI. What the Fifth Circuit did hold, however, was that (1) *"In this case, the only defense CTI has sought to raise is its 'alter ego' defense"* (444 F.2d 451, 463; Petition for Certiorari, p. 25a) (Emphasis added) and (2) this "alter ego" defense is identical to the argument fully litigated by CTI in its New York litigation with New Central (City Trade & Industries, Ltd. v. New Central Jute Mills Co., Index No. 14,445/65 (Sup. Ct., N.Y., Jan. 11, 1968), *aff'd as modified*, 30 App. Div. 2d 513, 290 N.Y.S.2d 108 (1st Dept. 1968), *aff'd*, 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52 (1969)).

This Court's attention is respectfully called to the fact that the Fifth Circuit had before it all pleadings of the parties in the District Court and also a cerified copy of the Record on Appeal and the opinion of the Court of Appeals in the New York litigation between CTI and New Central.[4] The Fifth Circuit was therefore well equipped to make a precise comparison of the issues raised by CTI in the District Court with those raised by it in the New York State courts, and such a comparison was in fact made:

> After a careful examination of the pleadings and opinions in the New York action, we have concluded that the "alter ego" issue in New York as litigated and adjudicated was identical to the "alter ego" issue in the interpleader action below. CTI's "alter ego" argument consists of a number of ostensibly separate, but actually overlapping charges made by CTI in

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[4] A certified copy of the Record on Appeal and the opinion of the New York Court of Appeals in the New York proceedings was made a part of the Indian Banks' motion for summary judgment.

> New York to support its contention that the Banks were suing CTI in Georgia as "fronts" for New Central; and in the instant interpleader action to support its contention that the Banks are not holders in due course. Point for point, and almost word for word, CTI made the same charges in New York with respect to New Central's relationship with the Banks that it made below. Specifically, CTI charged both in New York and below that the Banks were "alter egos" of New Central because (1) the trade acceptances had been paid by New Central directly to the Banks [Appendix p. 17 and p. 373]; (2) the Banks were acting as collecting agents for New Central in the Georgia action [Appendix pp. 17, 21 and p. 382]; (3) the Banks had actual knowledge that CTI was New Central's exclusive distributor and selling agent and not a purchaser [Appendix pp. 45-47 and pp. 364-367]; (4) the trade acceptances were owned and controlled by New Central [Appendix p. 51 and p. 375]; and (5) New Central was the real party in interest in the Georgia actions, while the Banks were acting only as straw plaintiffs for New Central [Appendix p. 61 and p. 308]. 444 F.2d 451, 459; Petition for Certiorari, pp. 15a, 16a.

The above, including all bracketed citations to the appendix to the briefs in the Fifth Circuit, is a direct quotation from the body of the Fifth Circuit's opinion. By way of explanation, the first citation within each bracket is to pleadings of CTI in the instant action, and the second citation is to identical pleadings of CTI in the New York action. All citations relate to the alleged status of the Indian Banks as "alter egos."

CONCLUSION

Some or all of the issues in this case have now been dealt with by three New York courts, two Georgia courts, and two federal courts.[5] As Chief Justice Burger has recently stated, litigation must at some point in time come to an end. The Indian Banks submit that that time, in this seemingly interminable litigation, has arrived.[6] For the foregoing reasons, Respondents, Allahabad Bank, Bank of Baroda and Bank of Tokyo, Ltd. urge,

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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[5] Allahabad Bank, Ltd. v. City Trade & Industries, Ltd., (Super. Ct. Ga. No. 4148, Mar. 2, 1966), *aff'd in part,* City Trade & Industries, Ltd. v. Allahabad Bank, Ltd., 114 Ga. App. 12, 150 S.E.2d 182, *cert. denied,* (1966); City Trade & Industries, Ltd. v. New Central Jute Mills Co., Index No. 14,445/65 (Sup. Ct. N.Y., Jan. 11, 1968), *aff'd as modified,* 30 App. Div. 2d 513, 290 N.Y.S.2d 108 (1st Dept. 1968), *aff'd,* 25 N.Y.2d 49, 302 N.Y.S.2d 557, 250 N.E.2d 52 (1969); James Talcott, Inc. v. Allahabad Bank, Ltd., 310 F. Supp. 6 (S.D.Ga., 1969), *aff'd in part,* 444 F.2d 451 (5th Cir., 1971).

[6] As required by the Fifth Circuit (444 F.2d 451, 463; Petition for Certiorari, pp. 24a, 25a), the negotiable instruments have been produced by the Indian Banks under appropriate pleading in the District Court. A hearing thereon is scheduled.